1946 **K** **File No.** J. Cr. P. C. 46

V

Legal Deptt

BRANCH

Subject:— Opinions under the Code of Criminal Procedure, 1898

P. 93/46

J. Cr. P. C./46

File No.

Gen. 194 e.

42 A

CONTENTS.

Legal Department File No.O. Cr.P.C./1946.

Sr. No.	R.I. / O.No.		Subject.	Pages.
			Opinions under the Criminal Procedure Code, 1898.	
22.	11263 / 20-12-45	86 / 5-1-46	Question whether payment of "Bhatta" allowances to the witnesses called upon to give evidence in a departmental enquiry would tantamount to be an inducement for obtaining evidence.	1-4
23.	538 / 19-1-46	-	G.R.-R.D. No.1334/45, dated 16-1-46 Re: Prosecution. Sambhaji Bapuji. Police Patil of Pangaon, taluka Barsi, District Sholapur. ... (Copies not taken)	5-6
24.	9308/ 23-10-45		Question whether Indian States which have introduced the Code of Criminal Procedure cannot be treated in the same way as the provinces of British India. ...	7-10
25.	11233 / 20-12-45	1830 / 13-2-46	Question whether Police Head-Constable can make a panchnama in respect of cases under the Cotton Cloth and yarn (control) Order, 1943. If not, whether it would be legally correct to issue general directions to all the District Magistrates. ...	11-16
26.	10876 / 3-12-45	1603 / 26-2-46	Re: R.L.A's opinion No.6137, dated 20-8-45, upsetting of the existing practice of sending cases under sec.211, I.P.C. by the Police as regulated by the orders in certain Rules of the Bombay Distt.Police Manual Vol.III and I.G.Ps Circulars. Question as to how the orders stated above should be modified to conform with the High Court decision. Question also whether there is any objection to the withdrawal or re-institution of Police cases which are not filed in keeping with the R.L.A's opinion mentioned above.	

3118

Sr.No.	Compilation No.	Subject.	Pages.
27.	R.I.No. 1679/25.2.46 O.No.1889/7.3.46	Re: Sanction of Provincial Govt. for prosecution of Indore state subject at Indore as he was arrested at Ahmedabad and the offence was committed in Bombay Question whether such a sanction can be given by this Government and if so under what authority.	21-24
28.	O.No.2598/5.4.46	Re Prosecution of Asstt. Excise Inspector of Police Patel who are alleged to have taken or abetted the taking of illegal gratification and destroyed a panchanama with a view to preventing its production as evidence in a Court of law-offences punishable under secs.161 and 204, I.P.C. Question whether the Govt. sanction under sec.197(1) Crim.Pro Code is necessary for prosecuting the Inspector and Police Patel.	25-28
29.	O.No.3711/17.5.46	Re: certain police cases pending in the Court of the City Magistrate, Surat, whose record was completely destroyed in the Fire. Questions (1) whether the City Magistrate, Surat, cannot himself try the cases de novo or whether they should be tried by Magistrates other than the City Magistrate; (2) whether the gambling cases in which betting slips and original panchanamas were destroyed and those cases under the D. of India Rules and Hoarding and Profiteering Prevention ordinance where also panchnamas and mudamal were destroyed can be taken up fresh	29-30
30.	R.I.No.4726/28.5.46 O.No.4627/27.6.46	Re: Govt. sancton under sec.196 Cri. Pro. Code for prosecution for offence punishable under Sec.171-D, I.P.C Question whether such a sanction is necessary	31-34
31.	O.No.231-Confl/25.5.46 u.o.r. to Adv. General, Bombay R.I.No. 61-P-Confl./27.6.46 (Adv.Genl.'s opinion No. 10 dt.25.6.46) O.No.241-Confl./2.7.46	Question whether there is any objection to refunding the fines which have been recovered under distress warrants from the Political prisoners who had already served their sentences in lieu of fine.	35-44

S.R.C
14/5
MC

Sr.No.	Compilation No.	Subject.	Pages.
32.	R.I.No.62-P/28.6.46 O.No.160-P/8.7.46	Question whether sanction of Govt. under sec.197(1) of the Code of Crim.Procedure 1898, is necessary for prosecution of Ex.Mamlatdar for offence under sec.161 I.P.C.	45-49
33.	R.I.No.x 117 P/25.7.46 O.No.283-P/3.8.46	Question whether it will be possible for the Distt. Magistrates, to issue instructions that appeals from the 2nd and 3rd Class Magistrates shall be heard by the selected Senior Civil Judges, the selection being done by Government after consultation with the High Court.	50-54
34.	R.I.No.6526/21.6.46 O.No.5537/8.8.46	Question whether affidavits before justices of peace can have the same force as those before the Magistrates.	55-56
35.	R.I.No.6155/11.7.46 O.No.404-P-Confl.23.8.46	Re: Attachment of property consisting of a house & movables under sec.88 of Crim.Pro.Code as the person concerned was absconding Damage to the house during the period it was under attachment due to rain Question whether Government is liable to pay compensation for damages as demanded by the owner.	57-62
36.	O.No.5303/30.7.46	Questions.(1) whether when a person is sentenced for an offence by the Court- Martial, his trial by a civil court for the same offence on the same facts would be barred by sec.403(1) of the Code of Cri. Procedure, 1898, notwithstanding the provisions of sec. 162 of the Army Act, 1881; (2) whether the view expressed in para 3 of the Government of India, War Deptt. (Army Branch) letter No.145171/P.S.3(c)-3, dated the 17.5.46, is correct.	63-66
37.	O.No.6623/28.9.46	Question whether Govt. can intervene in the matter of entering the LalBaugh Estate a Wakf property to the Muslim Community, which was unauthorisedly and without the approval of the Muslim Community was sold forty years ago by a former Mujawar, as it contained Durgas and grave yard.	67-68

S.R.C 14/5

Sr.No.	Compilation No.	Subject.	Pages.
38.	O.No.6934/14.10.46	Question whether the appeal pending with the District and sessions court Allahabad can be transferred to any District and sessions Court subordinate to the Bombay High Court under Sec.527 of the Cri. Procedure Code.	69-70
39.	O.No.243-Confl./25.7.46	Question whether the action of sub-Inspector in refusing bail was illegal in view of the fact that the arrest was under sec.420,I.P.C. which is a bailable offence while Sec.468 which also applied to the case is a non-bailable and non-cognizable offence.	71-72
40.	O.No.7707/4.11.46	Re: Curfew orders issued under sub-sec.(b) of sec.144 of the Cri. Pro. Code by Local Officers. Change in the -in respect of hours and areas. H.D. view that all that Govt. has to do is to notify in the Gazette that the order issued by a Local officer shall remain in force and the time originally stated or until further orders and the local officer concerned can then make modifications in his original order according as circumstances require e.g. change of hours and areas. Question whether the above view is correct and if not how the further modifications in the curfew which the commr. of Police may desire to make should be notified.	73-76
41.	R.I.No.7632/2.9.46 O.No.6940/14.10.46	Re: complaints made by any person aware of the offence irrespective of whether he himself is concerned or not Investigation action of such complaints in presence of the complainant. Issue of General instructions to all D.M.s in this connection. Examination of draft circular by R.L.A.	77-82
42.	R.I.No.9491/30.10.46 O.No.8263/21.11.46	---do---	83-86
43.	O.No.324-confl./2611.46	Question whether it would not be legal to effect a general round up under sec. 54 of the Code of Criminal Procedure, 1898.	87-90

S-RC 14/5 IIB 14/5

Sr.No.	Compilation No.	Subject.	Pages.
44.	O.No.8778/6.12.46	Re: Seditions speeches. Action against the p rson concerned under sec.107, Cri.Pro.Code.	91-92
45.	O.No.8858/9.12.46	Re: Bom. on entry of Dawn into this province prevention of transmission thereof by post under sec. 26(1) of the Indian Post Offices Act, 1898 and sec.22, of the Indian Press (Emergency Powers) Act, 1931.	93-94
46.	R.I.No.11727/23.12.46	G.C.H.D.,No.1283/5/dt.19.12.46 Re: Inquiries. Mode of conducting - into complaints made by members of the public. (Copies not taken)	95-96
47.	R.I.No.3399/20.3.47	G.C.,H.D.,No.1283/5 dt.17.3.47 Re: Inquiries. Mode of conducting-into complaints made bymembers of the public. (Copies not taken)	97-98
48.	R.I.No.3834/29.3.47	G.C.H.D.No.1283/5,dt.26.3.47. (Copies not taken).	99-100

S.R.C 14/5

Sr. No.	Compilation No.	Subject.	Pages.
27.	R.I.No.1679/25.2.46 O.No.1889/7-3-46.	Re; Sanction of Provincial Govt. for prosecution of Indore state subject at Indore as he was arrested at Ahmedabad and the offence was committed in Bombay Question ~~whether~~ whether such a sanction can be given by this Government and if so under what authority.	21-24.
28.	O.No.2598/5.4.46.	Re: Prosecution of Asstt. Excise Inspector of Police Patel who are alleged to have taken or abetted the taking of illegal gratification and destroyed a panchnama with a view to preventing its production as evidence in a court of law offences punishable under secs. 161 and 204 I.P.C. Question whether the Govt. sanction under sec-197(1) Crim- Pro.Code is necessary for prosecuting the Inspector and Police Patel.	25-28.
29.	O.No.3711/17.5.46.	Re: certain police cases pending in the Court of the City Magistrate, Surat, whose record was completely destroyed in the Fire. Question(1) whether the City Magistrate Surat, cannot himself try the cases de novo or whether they should be tried by Magistrate other than the City Magistrate (2) whether the gambling cases in which betting slips and original panchanamas were destroyed and those cases under the D. of India Rules and Hoarding and Profiteering Prevention ordinance where also panchnamas and mudumal were destroyed can be taken up fresh.	29-30
30.	R.I.No. 4726/28.5.46 O.No. 4627/27.6.46.	Re: Govt. sanction under sec.196 Cri. Pro. Code for prosecution for offence punishable under Sec.171-D I.P.C. Question whether such a sanction is necessary.	31-34
31.	O.No.231-Confl/25-5.46 u.p.r. to Adv. General Bombay R.I.No.61-P-Confl /27-6.46 (Adv.Genl's opinion No. 10 dt.25.6.46) O.No.241-Confl./2.7.46.	Question whether there is any objection to refunding the fines which have ben recovered under distress warrants from the Political prisoners who had already served their sentences in lieu of fine.	35-44.

Sr. No.	Compilation No.	Subject.	Pages.
32.	R.I.No.62-P/28.6.46 O.No.160-P/8.7.46.	Question whether sanction of Govt. under sec. 197(1) of the Code of Crim. Procedure 1898 is necessary for prosecution of Ex. Mamlatdar for offence under sec. 161 I.P.C.	45-50
33.	R.I.No. 117 p/25.7.4 O.No.283-P/3.8.46.	Questions whether it will be pos ible for the Distt. Magistrate to issue instructions that appeals from the 2nd and 3rd Class Magistrates shall be heard by the selected Senior Civil Judges the selection being done by Government after consultation with the High Court.	51-54
34.	R.I.No.5526/21.8.46 O.No.5537/8.8.46.	Question whether affidavits before the justices of peace can have the same force as those before the Magistrates.	55-56
35.	R.I.No.6165/11.7.46 O.No. 404-P-Confl. 23.8.46.	Re: Attachment of proeprty consisting of a house under sec. 88 of Crim. Pro. Code as the person concerned was absconding Damage to the house during the period it was under attachment due to rain. Question whether Government is liable to pay compensation for damages as demanded by the owner.	57-62
	O.No.5308/30.7.46	Questions(1) whether when a person is sentenced for an ofence by the Court Martial his trial by a civil court for the same offence on the same facts would be barred by sec. 403(1) of the Code of Cri. Procedure. 1898, notwithstanding the provisions of sec. 162 of the Army Act, 1881,(2) whether the view expressed in para 3 of the Government of India, War Dptt. (Army Branch) letter No. 145171/S 3(c)-3 dated the 17.5.46 is correct.	
37.	O.No.6623/28.9.46.	Question whether Govt. can intervene in the matter of entering the Lalbaug Estate a Wakf property to the Muslim Community, which was unauthotisedly and without the approval of the Muslim Communityy was sold forty years ago by former Mutawalli as it contained Durgas and grave yard.	67-68

Sr. No.	Compilation No.	Subject.	Pages.
38.			
38.	O.No.6934/14.10.46.	Question whether the appeal pending with the District and sessions court Allahabad can be transferred to any District and sessions Court subordinate to the Bombay High Court under Sec. 527 of the Cri. Procedure Code.	69-70
39.	O.No.243-Confl./25.7.46	Question whether the action of sub-Inspector in refusing bail was illegal in view of the fact that the arrest was under sec. 420 I.P.C. which is a bailable offence while Sec. 468 which also applied to the case is a non-bailable and non-cognizable offence.	71-72
40.	O.No.7707/4.11.46.	Re: Curfew orders issued under sub-sec (b) of sec. 144 of the Cri.Pro.Code by Local Officers. Change in the-in respec of hours and areas. H.D. view that al all that Govt. has to do is to notify in the Gazette that the order issued by a Local ifficer shall remain in force and the time originally stated or until further orders and the local officer concerned can thenmake modifications in his original order according as circumstances require e.g. change of hours and areas. Question whether the above view is correct and if not how the further modifications in the curfew which the commr. of Police may desire to make should be notified.	
41.	R.I.No.7632/2..9.46 O.No.6940/14.10.46.	Re; complaints made by any person aware of the offence irrespective of whether he himself is concerned or not-investigation of such complaints in presence of the complaint. Issue of General instructions to all D.M.S. in this connection. Examination of draft circular by R.L.A.	
42.	R.I.No. 9491/30.10.46 O.No. 8263/21.11.46.	------do-----	
43.	O.No.324-confl./2611.46.	Question whether it would not be legal to effect a general round up under sec. 54 of the Code of Criminal Procedure. 1898.	87-90

Sr. No.	Compilation No.	Subject.	pages.
44.	O.No.8778/6.12.46.	Re: Seditions speeches. Action against the person concerned under sec. 107, Cri.Pro.Code.	91-92
45.	O.No. 8858/9.12.46.	Re: Bom. on entry of Dawn into this province prevention of transmission thereof by post under sec. 26(1) of the Indian Post. Offices Act. 1898 and sec.22, of the Indian Press (Emergency Powers) Act.1931.	93-94
46.	R.I.No.11727/23.12.46	G.C.H.D. No. 1283/5/dt. 19.2.46 Re; Inquiries . Mode of conducting - into complaints made by members of the public.	95-96
47.	R.I.No.3399/20.3.47	G.C.H.D. No. 1283/5 dt.17.3.47 Re: Inquiries. Mode of conducting into complaints made bymembers of the public.	
48.	R.I.No. 3834/29.3.47.	G.C.H.D. No. 1283/5 dt. 26.3.47.	99-100

VGP. 14-6-56.

"Bhatta" is generally granted as compensation for the loss of wages which the witnesses would otherwise have earned. and not as an inducement for giving evidence. Consequently there will be no legal objection to paying "bhatta" to witnesses called to give effidence in a departmental inquiry.

Sd.

p.o.

Remembrancer of Legal Affairs.

U.R. to Controller of Rationing No. 86, dated the 5th January 146.

VGP.

13-6-56.

The Criminal Procedure Code applies to British India. "British India" as defined in clause (7) of section 3 of the General Clauses Act, 1897 does not include a native state. The introduction of Criminal Procedure Code in a native state means that the Code will be operative in that State as a separate Code as it is in British India and does not thereby render that Stat e part of British India.

Sd.

O.C.
Remembrancer of Legal Affairs.

U.R. to H.D. No. 329 dated the 15th January 1946.

VOP.
13-6-56.

At the date of the alleged offence the Cotton Cloth and Yarn (Control) Order, 1943, was in force. This Order was repealed by the Cotton Cloth and Yarn (Control) Order, 1945 but that first proviso to clause 2 of the 1945 Order lays down that anything done under any provision of the 1943 Order shall be deemed to have been done under the corresponding provision of the 1945 Order. The Textile Commissioner's Notification No. 34-Tex A. (15) 3/43 dated the 12th October 1943 as amended by his Notification No. 34-Tex.A. (15) 3/43 dated the 23rd December 1943 was issued under clause 21 of the Cotton Cloth and Yarn (Control) Order 1943 It empowered amongst others all police officers not below the rank of a Sub-Inspector -

(i) to enter and search any premises, and

(ii) to seize any cloth or yarn in respect of which he has reason to believe that a contravention of the Order has been committed.

In view of the proviso referred to above this notification must be deemed to have been issued under the corresponding clause 21 of the Cotton Cloth and Yarn (Control) Order, 1945.

2. The Cotton Cloth and Yarn (Control) Orders of 1943 and 1945 were issued under rule 81(2) of the Defence of India Rules and the breach thereof, being punishable with imprisonment for a term which may extend to three years or with fine or both is a cognizable offence. (See section 4(f) of the Criminal Procedure Code and the Second Schedule thereto relating to offences against other laws). It can be investigated inquired into, tried and otherwise dealt with according to the provisions of the Criminal Procedure Code but subject to any enactment for the time being in force regulating the manner or place of investigation, inquiring into, trying or otherwise dealing with such offences. (See section 5(2) of the Criminal Procedure Code). Sub-section (1) of section 156 of the Criminal Procedure Code empowers a police officer in charge of a police station to investigate cognizable cases.

P.T.O.

Sub-section (2) provides that no proceeding of a police officer in any such case shall at any stage be called in question on the groun that the case was one which such officer was not empowered under this section to investigate. "Officer in charge of a ~~xxxxxx~~ station" as defined in section 4(p) of the Criminal Procedure Code includes, when the officer in charge of a police station is absent from the station house or unable from illness or other cause to perform his duties, the police officer present at the station house who is next in rank to such officer and is above the rank of a constable or when the Provincial Government so directs any other police officer so present. It is not clear from the papers whether in the present case Head Constable Gurue was in charge of the police station in the absence of the Sub-Inspector when he investi gated the offence. If he was then his investigation cannot be called in question under the provisions of section 156(2) of the Criminal Procedure Code.

5. It is no doubt true that under clause 21 of the Cotton Cloth and Yarn (Control) Order 1945, a Head Constable cannot be empowered by the Textile Commissioner to exercise the power of entry, search and seizure. Assuming that the Head Constable in the present case was not justified in exercising the powers of searc and s izure even so having regard to the ruling in Maung San (7 Rangoon 771) illegal search and seizure of property would not miti gate the offence nor would it operate as a bar to the conviction o the accused. Persons who make a search illegally render themselves li liable to be sued for damages, but their illegal action does not affect the question whether the person whose house was illegally searched has committed an offence. That apart it is for the administrative department to consider whether on merits and on the uncorroborated evidence of the bogus customer a prosecution if laun ched is likely to succeed.

Sd.

S.S.

Remembrancer of Legal Affairs.

U.R. to F.D. (S.) No. 1236 dated the 13th February 1946.

The orders referred to in para. 2 of H.D. office note at p. 63 being merely in the nature of executive instruction for the guidance of police officers may be substituted by fresh orders conforming to the decision of the High Court in Emperor v. Balaji Appaji (47 B.L.R. 664). H.D. may send the draft orders if necessary to L.D. for scrutiny.

2. In Emperor v. Balaji Appaji the High Court has held that in cases where the complainant is to be prosecuted under section 211 I.P.C. for giving false information to the police then a complaint under section 195(1)(b) I.P.C. from the Magistrate who passed the order on the final report of the police is required. "If a court entertains a case covered by section 195 Cr. P.C. without such a complaint as the law requires, its proceedings are void. The case is not empowered to try the offender except upon a complaint made by a proper authority. The absence of a complaint in writing as required by section 195(1) makes the court now of competent jurisdiction xxxxxxxxx and therefore renders valueless the previous acquittal as a bar to his retrial on the same facts after proper complaint is made. A Magistrate has no jurisdiction till the complaint is made. A and a conviction founded on evidence without jurisdiction is bad." (See Hari Rao's Cr. P.C. pp 628, 629). In all pending cases under section 211 I.P.C. without a proper complaint as provided in section 195(1)(b) Cr. P.C. the attention of the Magistrate should be invited to the decision of the High Court in Emperor v. Balaji Appaji and they may be requested to dismiss them

for want of jurisdiction, and after such dismissal there would be no legal objection to reinstituting those cases on the complaints in writing of the courts concerned.

Sd.

O.C.

Remembrancer of Legal Affairs.

U.R. to H.D. No. 1603, dated the 26th February 1946.

VGP.

13-6-56

Presumably the sanction of Government for trial of the substantive offence of forgery is asked for by the Indore State under some provision of law in that state analogous to section 188 of the Code of Criminal Procedure, 1898. This may be verified by P.&. S.D. from the Resident or Indore State before according sanction.

Sd.

O.C.

Remembrancer of Legal Affairs.

U.R. to P.&. S.D. No. 1889, dated the 7th March 1946.

VGP.

13-6-56.

Mr. Zuzart, Excise Assistant Inspector and Baboo Bhanudas Police Patel are alleged to have taken or abetted the taking of illegal gratification and destroyed a panchnama with a view to preventing its production as evidence in a court of law - offence punishable under sections 161 and 204 I.P.C. The question referred to the R.L.A. for consideration is whether the sanction of Government under section 197(1), Cr. P.C. is necessary for prosecuting them.

To attract the provisions of section 197, Cr.P.C. what is necessary is that -

(a) the public servant is not removable from his office save by or with the sanction of the Provincial Government or some higher authority and

(b) the offence must have been committed by him while acting or purporting to act in the discharge of his official duty.

Under section 8 of the Bombay Abkari Act, 1878, power to appoint subordinate officers vests in Government. The power to appoint includes the power to remove or dismiss from office. If that power has been delegated to the Commissioner as presumably it has been then Mr. Zuzart cannot be deemed to be a public servant not removable from office save by or with the sanction of Government and section 197(1). Cr.P.C. would be inapplicable see Afzalur Rahman v. the King Emperor, 1943 F.C.R. Vol.V. p.7).

A Watandar Patil is not removable from office save by or with the sanction of the Provincial Government (see 20 B.L.R. 89). Consequently sanction under section 197(1) Cr. P.C. would be necessary to prosecute Babu Bhanudas Watandar Police Patil provided the acts of receiving illegal gratification, the abetment thereof and destruction of the panchnama were done by him while acting or purporting to act in the discharge of his official duty. In Province of Bihar v. Rameshwar (23 Patna 738) the Patna High Court following the decision of the Federal Court in Hari Ram Singh v. Emperor (1939 F.C.R. 159) held that the act of receiving illegal gratification could not be deemed done orpurporting to be done in the execution of duty and consequently no section of Government would be necessary under section 197(1). Cr P.C.

But in Hector Thomas Huntley v. King Emperor (1944 F.L.J.R. Vol. VII p. 167, the Federal Court held that the receiving of illegal gratification by a public servant was not an act done or purporting to be done in the execution of his duty as a servant of the Crown within the meaning of section 270(1) of the Government of India Act. 1935 and left the question open whether the acts contemplated by section 197 of the Code are the same as the acts contemplated by section 197 of the Code are t e those covered by section 270(1) of the Constitution Act. In the Patna decision quoted above it was held that there was no material distinction between the relevant phrases in t two sections (i.e. section 197(1) Cr. P.C. and section 270(1) of the Constitution Act). In the absence of any definite decision of the Federal Court or of the Privy Council the question does not appear to be free from doubt. It has hitherto been the practice of this Government to grant sanction under section 197(1) Cr. P.C. for xxx prosecuting a Government servant for the offence under section 161 I.P.C. In Emperor v. Bhimaji Venkaji Wadgir (20 B.L.R. 89) the accused a Watandar Patil was charged with harbouring an offender and receiving a bribe from him and was prosecuted without the sanction of Government under section 197(1) Cr. P.C. and the High Court held that in the absence of such sanction the whole proceedings before the Magistrate were without jurisdiction and totally invalid. In Ketri Illahi (1911 P.W.R. 26 quoted at p. 891 of Vol. I of Gour's Penal Law of India) it has been held that the sanction of Government is necessary for the prosecution of Judges and public servants not removable from their office without the sanction of Government. In the circumstances it appears safer to grant sanction under section 197(1) Cr. P.C. to prosecute the Police Patil for the offence under section 161, I.P.C.

Under section 39 of the Bombay Abkari Act. 1878 village officers are bound to assist an Abkari officer in carrying out the provisions of the Act: and under section 38 Mr. Zasart was empowered to search and hold panchnama. Since the Police Patil was asked t

asked to assist Mr. Zusart in searching the house of the suspect the presence of the Police Patil at the search and the Panchnama can be deemed to be in the discharge of his official duty. He seems to have had a hand in the destruction of the Panchnama after it was made for which he was paid some illegal gratification as consideration. In destroying or abetting the destruction of the Panchnama he seems to have been acting or purporting to act in the discharge of his duty. Although the point is doubtful, caution dictates that sanction should be granted under section 197(1) for prosecuting the Police Patil for the offence section 204, I.P.C.

The same considerations will apply if Mr. Zusart is not removable from his office save by or with the sanction of Government.

Sd.

O.C.

Remembrancer of Legal Affairs.

U.R. to R.D. No. 2598, dated the 5th April 1946.

VGP.

13-6-56

It appears that there were certain Police cases pending in the Court of the City Magistrate, Surat, whose record was completely destroyed in the fire which took place on 13-2-46 Most of the Police cases were partly heard or almost finished. The questions referredby the District Magistrate, Surat to the Remembrancer of Legal Affairs for advice are :-

(1) Whether the City Magistrate, Surat, cannot himself try the cases de novo or whether they should be tried by Magistrate other than the City Magistrate.

(2) Whether the gambling cases in which betting slips and original Panchnamas were destroyed and those cases under the Defence of India Rules and Hoarding and Profiteering Prevention Ordinance where also panchanamas and mudamal were destroyed can be taken up afresh.

The first question does not survive in view of the District Magistrate's later communication at page 9 ante that Mr. B.D. Mehata, City Magistrate, Surat has since reverted as Mamlatdar of Prantij Ta Taluka. It would be competent for Mr. G.D. Jadhav the new City Magistrate to hear these cases again.

Under section 7 of the Bombay Prevention of Gambling Act, 1887. the seizure or any instrument of gaming shall be evidence until the contrary if proved, that such house, room or place is used as a common gaming house and the persons found therein were then present for the purpose of gaming, although no gaming was seen by the Magistrate or the Police Officer of them, or by any person acting under the authority of either of them. The betting slips and the original panchnamas which were presumptive proof under section 7 being destroyed, it would in the absence of any satisfactory secondary evidence, be difficult if not impossible to prove these gambling cases.

In cases under the Defence of India Rules and the Hoarding and Profiteering Prevention Ordinance the panchnamas and mudamal are of considerable importance as evidence and in their absence it would be extremely difficult to secure convictions. In the circumstances it would not be advisable to proceed with the prosecutions.

Remembrancer of Legal Affairs.

U.R. to H.D. No. 3711 dated the 17th May 1946.

 Office of the R.L.A.

From the facts stated by the District Magistrate, Sholapur at pages 1-2 ante a prima facie case seems to have been made out against Bhagwat Namdeo Thite. The District Magistrate in asking Government to give sanction under section 196 of the Code of Criminal Procedure for the prosecution of the accused has, however, overlooked the amendment made in that section by Bombay Act XXIX of 1953. The Bombay Act has omitted the offence of personation punishable under section 171-F of the Indian Penal Code from the provisions of section 196 of the Code of Criminal Procedure with the result that the sanction of the provincial Government is no longer necessary for prosecution any person for committing that offence.

Sd.

V.V.

Remembrancer of Legal Affairs.

U.R. to H.D. 4627, dated the 27th June 1946.

VGP.

14-6-56,.

Statement of the case.

The question raised for consideration is whether there is any objection to refunding the fines which have been recovered under distress warrants from the political prisoners who had already served their sentences in lieu of fine.

2. Sub-section (1) of section 386, Criminal Procedure Code provides:

> "Whenever an offender has been sentenced to pay a fine the Court passing the sentence may take action for the recovery of fine in either or both of the following ways, that is to say it may -
>
> (a) issue a warrant for the levy of the amount by attachment and sale of any movable property belonging to the offender.
>
> (b) issue a warrant to the Collector of the District authorising him to realise the amount by execution according to civil process against the movable or immovable property, or both, of the defaulter :
>
> Provided that, if the sentence directs that in default of payment of the fine the ofender shall be imprisoned and if such offender has undergone the whole of such imprisonment in default no Court shall issue such warrant unless for special reasons to be recorded in writing it considers it necessary to do so."

Sub-section (1) of section 401 provides:

> "When any person has been sentenced to punishment for an offence the Provincial Government may, at any time without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit, the whole or any part of the punishment to which he has been sentenced."

Sub-section (5) lays down:

> "Nothing herein contained shall be deemed to interfere with the right of His Majesty or of the Central Government when such right is delegated to it, to grant pardons, reprives, respites or remissions of punishement."

3. Sub-section (1) section 401 empowers Government to remit the whole or any part of the punishment to which a person has been sentenced. "Fine" is a kind of punishment as defined in section 53. Consequently Government is vested with power to remit the whole or any part of the fine to which an offender has been sentenced. Whether this power extends to fine already recovered from the offender is the question now for consideration. Reading together sub-sections (1) and (5) of sections 401 it appears

that there is a distinction between "pardon" and "remission". The effect of a pardon under the Great Seal is to clear the person from all infamy and from all consequence of the offence for which it is granted and from all statutory or other disqualifications following upon conviction. It makes him, as it were, a new man. so as to enable him to maintain an action against any prson afterwards defaming him in respect of the offence for which he was convicted, and in the days when crime disqualified a man from being a witness, removed the disqualification" (Halsbury's Laws of England, Vol 6.p.479). In Venkatesh Yeshwant v. Emperor A.I.R. 38 Nag 515 Vivian Bose J. observed.

"I do not think that the Executive Government has got unferrered and unqualified freedom of action in these matters. Viewed in a broad and liveral light its powers in this respect are in a sense derived from a statutory delegation of the Royal Prerogative of pardon; not coextensive with it, and not superior to it, in fact S.401(5) Criminal P.C. leaves the right of His Majesty and of the Governor General when such right is delegated to him, intact, but certainly of a like general character.

That being so, I cannot think that the rights or the execution can be greater than those of His Majesty himself except and unless, and only in so far as they are specifically enlarged by statute."

It appears that the effect of pardon under sub-section (5) of section 401 is as good as annulment of conviction whereas the effect of remission under sub-section (1) is merely to wipe out the punishment leaving conviction intact,(see 1939 Rangoon Law Reports p.44) If the punishment is already surrered there would be no question of remission. Sub-section (1) of section 401 related to remission of sentence, that is to say, punishment by imprisonment as well as or fine. If

imprisonment is already undergone, no question of remission can arise. Likewise if fine is already paid, no question of its remission can arise.

4. The expression "remit" has not been defined in the Criminal Procedure Code. According to the New Standard Dictionary of the English Language, "to remit" means -

(1) "to pardon the guilt and annul the penalty of, as sin; forgive

2) to refrain from exacting as a penalty; discharge from; countermand the exaction of; as, to remit a fine.

The expression "remit" in sub-section (1) of section 401 does not appear to have been used in the first sense namely, "pardon the guilt or annul the penalty of sin" since that is covered by the expression "pardon" in sub-section (5). It seems to have been used in the second sense, namely, "refrain from exacting as a penalty; discharge from; countermand the exaction of; as to remit a fine". It appears that "The Act for preventing certain abuses and profanations on the Lord's Day called 'Sunday' (Geo. 3 Ch. 49) was amended by the Remission of Penalties Act (38 and 39 Vict. 1875) providing as follows:

> "It shall be lawful for Her Majesty to remit in whole or in part any penalty, fine or forfeiture imposed or recovered for any offence under the said Act, whether on indictment, information, or summary conviction, or by action, or any other process".

The Act was amended since doubts were entertained as to the power of the Crown to remit penalties and forfeitures incurred under it. The amending Act related to the remission of penalty, fine or forfeiture imposed or recovered. If remission would ordinarily cover penalties already undergone or recovered, there was no reason expressly to so provide in the amending Act. In the circumstance

circumstance it appears that remission under sub-section (1) of section 401 of the Criminal Procedure Code relates to penalties or fine but not wholly undergone or recovered. There is no provision in the Ciminal procedure Code authorising Government to refund the fine recovered in compliance with the proviso to section 386(1) Fines duly recovered become part of the Provincial revenues and no refund or expenditure therefrom shall be legal unless it has been duly authorised by the Assembly: (See section 80(3) of the Government of India Act, 1935).

5. Since however the point is not free from doubt and is of great importance, the Advocate General is requested to record his opinion at an early date.

Id/-

Remembrancer of Legal Affairs.

U.R. to Adv. General, No. 231-Confl., dated the 25th May 1946.

Id/- 24/5

R.A. Id/- 24/5 It is for order whether a copy of statement would be sent to H.D. for information

A.A.L.R.

Id/- 24/5/46

EVY. 31/7.

No. 10 of 1946.

ADVOCATE GENERAL'S CHAMBERS
HIGH COURT.
BOMBAY 25th June 1946.

U.R. to the Advocate General, Bombay, No. 231-Confl. dated the 25th May 1946.

OPINION.

Re, Refund of Fines from Political Prisnmoners.

I entirely agree with the opinion of the Remembrancer of Legal Affairs, and in view of the fulness of it, it is unnecessary for me to refer again to the material and relevant provisions which are all set out in the statement of the case.

The word "Remit" as used in the relevant sections, refers to a remitting of the penalty, a statement that it will not be recovered.

A fine once recovered is part of and merged in the revenues of the province. Any payment out is then not a repayment of a specific separate sum, but out of the general revenues. This can b authorised by the Assembly - Sec -- Section 80(3) of the Government of India Act, 1935, but cannot be done by enactment.

Advocate General.

VGP.

14-6-56.

Office of the R.L.A.

A copy of the Advocate General's opinion No. 10 of 1946 dated the 25th June 1946 together with a copy of the Statement of the Case prepared for him is forwarded herewith.

Sd.

O.C.

Remembrancer of Legal Affairs.

U.R. to H.D No. 241-Confl. dated the 1st July 1946.

VGP.

14-6-56.

In his recent opinion No. 2598 dated the 5th April 1946 the A.L.A. has opined that in the absence of any clear Judicial decision either of the Bombay High Court or of the F deral Court caution dictates that sanction of Government may be considered necessary under section 197, sub-section (1), Criminal Procedure Code, for prose cuting for the offence of bribary a Government servant not removable from office save with the sanction of Gover nment.

2. Before the Government of India Act of 1935, came in to operation power to appoint Mamlatdars vested in the Commissioners of the divisions under section 12 of the Land Revenue Code, 1879. But although that power was sim vested in Government, in exercise of powers conferred by subsection (1) of section 241 of the Government of India Act, 1935, His Excellancy the Governor of Bombay. by notification No. 1527-33-B dated the 1st Apr 37 has ordered that subject to any direction to the contrary that may thereafter be made in exercise of the said powers any officer subordinate to the Governor who was authorised by any law in force immediately before 1st day of April 1937 o make thex appointments to the ci vil services of, or civil posts under the Crown in conn ection with xxxxxxxxxxxx affairs, which are now in the affairs of the Province of Bombay is authorised to make the said appointments in like manner and subject to the like control by the Governor of Bombay as was exer cisable by the Central or Provincial Government before the said date. It is presumed that before the Govern ment of India Act, 1935, came into operation . the Commissioners of the divisions had uncontrolled power to appoint Mamlatdars. And it is also presumed that no direction to the contrary has since been issued by the Governor under sub-section (1) of section 241 of the Government of India Act. If so. the power to appoint Mamlatdars now vests in the Commissioners of the divisions

and that power includes power to dismiss or to remove from office. It is true that in the matter of apointment or punish ment of Mamlatdars the public service Commission is required to be consulted. (See item xi(a) in the Anne xure to the Regulations made under section 266 sub-section(3) of the Government of India Act). But the Commissioner is not bound to act according to the advice of the Public Service Commission. Consequently the Commissioner's power to appoint or remove Mamlatdars is in no way curtailed or restricted by the aforesaid Regulations. It appears from the note of Deputy Secy. R.D. at page 7 ante that the Commissioners have been asked to appoint persons as probationers for Mamlatdar without getting the prior approval of Government to the appointment. No copy of that order has been forwarded to the Legal Department. It is not therefore possible for the R.L.A. to consider the legal implications of that order, If however, that order has not been passed under section 241, sub-section (1) of the Government of India Act, 1935, it will have no force and the Commissioner's power to appoint or dismiss mamlatdars would remain unaffected. In the circumstances it is for R.D. to consider whether the Commissioner's power to appoint or dismiss Mamlatdars is subject to the prior approval of Government. If the prior approval of Government is not necessary, sanction under section 197, sub-section (1), Criminal Procedure Code, would be necessary to prosecute Mr. Kadri and Mr. Manjrekar for the offence of bribary.

Sd.

O.C.

Remembrancer of Legal Affairs

U.R. to R.D. No. 160-P, dated the 8th July 1946.

VGP. 14-6-56.

It would be competent to the District Magistrate to direct under section 407(1) of the Criminal Procedure Code that appeals against convictions on trials held by Second and Third Class Magistrates be heard by selected Civil Judges, Senior Division, who having been appointed as Magistrates of the First Class under section 12 of the Criminal Procedure Code are empowered by the Provincial Government after consultation with the High Court to hear such appeals, and to transfer under section 407 (2), Criminal Procedure Code, such appeals if already presented to them, to the said Civil Judges for disposal according to law.

Sd.

O.C

Remembrancer of Legal Affairs.

U.R. to H.D. No. 283-P, dated the 3rd August, 1946.

VOP. 14-6-56.

A/ As the Justices of Peace are officers competent to administer oath, any declaration on oath made before them will have the same force as before a Magistrate.

Id/-
19/7.

A.A.L.R. I agree. Reply may be as at A.
R.T.K. 20/7.

R.L.A.
I agree P. N. M
Id/-
5/8/46

U. R. to Passport office No. 5537, dated 8-8-1946.

EVY. 31/7.

Office of the R.L.A.

By the Home Department (Political) Circular No. S.D. 595 dated the 7th May 1946 Government decided to restore all properties which were attached, sealed or confiscated in connection with the civil disobedience movement of 1942, to the owners concerned. There was no improper or irregular use of the attached house of Bhikhubhai Nathubhai and the damage caused to his house during attachment was due to heavy rains. Consequently Bhikhubhai Nathubhai will not be legally entitled to claim compensation for the damage done or for the damage which the property may hereafter suffer by reason of his refusal to take possession.

2. Since, however, the property is restored to the applicant not under section 89 of the Criminal Procedure Code but under the Home Department ~~Criminal~~ Circular No. S.D. 595, dated the 7th May 1946, as a matter of grace, it is for the Home Department to consider whether any ex-gratia compensation should at all be given.

Id/-

Remembrancer of Legal Affairs.

U.R. to H.D.(Sel.) No. 404-P-Confl., dated the 23rd Aug. 1946.

EVY. 31/7.

Warrant Officer H.T. Randall, No. 2618559 was charged before the Chief Presidency Magistrate Bombay, for offence under section 123 of the Bombay City Police Act, 1902. It appears that in pursuance of rule 4 of the Criminal Procedure (Military Offenders) Rules, the accused was delivered over to the Military authorities for being tried by a Court-martial for the offence of which he was accused. The result of the Court-martial proceedings against Randall as communicated to the Police Dept follows:-

"C.S.M.Randall pleaded guilty to both the charges framed under sections 40 and 41 of the Army Act. He was found guilty and sentenced to loss of three months seniority in his war substantive work. The sentence was confirmed by the conveying authorities and promulgated by the C.O. on 24th June 1945."

The Deputy Commissioner of Police, Bombay, in his letter No. 9390/C.C. dated the 23rd July 1954 reported that the sentence inflicted on Randall by the Court martial was quite inadequate. The Chief Presidency Magistrate Bombay has concurred with the Deputy Commissioner of Police and applied to Government for orders directing the accused to be retried by a civilian court under section 71 of the Indian Army Act, 1911.

In their letter No. 9313/4-B dated the 30th August 1945 the Government of Bombay brought the case of H.R. Randall to the notice of the Government of India, War Department and enquired whether the Government of India had any objection to the trial of the accused by a civil court under section 71 of the Indian Army Act, 1911. In their letter No. 145171/P.S. 5 (c)-3 dated the 17th May 1946, the Government of India, War Department (Army Branch) replied as follows:-

"As Sgt. Randall is a person subject to the Army Act, section 162 of that Act applies in his case and not section 71 of the Indian Army Act.

As regards the retrial of this soldier by a civil court I am to point out that notwithstanding section 162 (2) of the Army Act, section 403(1)

or the Criminal Procedure Code bars the retrial by civil court for the same offence or on the same facts of a person subject to the Army Act who has been tried for an offence by Court-Martial.

The implication of the Chief Presidency Magistrate, Bombay that the proceedings of the Court Martial in the case of Sgt. Randall are not effective, in that the punishment awarded was inadequate, cannot be sustained. Rule 5 of Criminal Procedure (Military Offenders) Rules refers to effectual proceedings as an alternative to trial by Court Martial and hence trial by to trial by Court Martial and hence trial by Court Martial in this case cannot be objected to under that rule on the ground that the punishment awarded was inadequate. In the circumstances the Government of India regret their inability to agree to the retrial of Sgt. Randall by a civil court."

On these facts, the questions raised for the R.L.A.'s consideration are :-

(1) Whether, when a person is ~~ex~~ sentenced for an offence by the Court-Martial, his trial by a civil court for the same offence on the same facts would be barred by section 403(1) of the Code of Criminal procedure 1898, notwithstanding the provisions of section 162 of the Army Act. 1881

(2) Whether the view expressed in para. 3 of the Government of India, War Department(Army Branch) letter No. 145171/R&S/ P&S. 3(C)-3 dated the 17th May 1946. is correct.

Question 1.- Sub-section (1) of section 403 of the Criminal Procedure Code provides that a person who has been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence, shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same, offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236 or for which he might have been convicted under section 237. Sub-section (5) enacts that nothing in this section shall effect the provisions of section 26 of the General Clause Act, 1897, or section 188 of the this Code. Section 26 of the General Clause Act, 1897, provides that where an act or omission constitutes an offence under two or more enactments then the offender shall be liable to be prosecuted under either or any of these enactments, but shall not liable to be punished twice for the same

offence. This section does not act as a bar to a trial or conviction but merely as a bar to duplicated punishment. It is therefore clear that where an act is punishable under a special law and also under a general statute the offender could be proceeded with under either but could not be punished twice for the same act with constituted the offence (See Joti Prasad Gupta v. Emperor I.L.R. 53 All 642 at p.649). Thus having regard to the express provisions of section 403 of the Criminal Procedure Code and section 26 of the General Clause Act it does not appear legally feasible to subject Sgt. Randall who has already been convicted and sentenced by a Court Martial, to a fresh trial for the same offence and on the same facts.

Question 8.- Rule 5 of the Rules framed by Government of India under section 549(1) Criminal Procedure Code provides:

"Where an accused person, having been delivered by the Magistrate under rule 3 or 4 is not tried by a Court Martial for the offence of which he is accused or other effectual and Proceedings are not taken or ordered to be taken, against him the Magistrate shall report the circumstance to the local Government."

"Effectual proceedings" contemplated are proceedings of a judicial nature and must be directed towards the determination of the accused person's guilt or innocence and his punishment if found guilty. (See R.L.A.'s opinion No 81-P Confl., dated the 31st July 1944). In the present case it appears that the courtmartial did try Sgt.Randall. Consequently it cannot be said that the proceedings taken by the court-martial against Sgt.Randall were ineffectual merely because the punishment awarded was inadequate.

The view taken by the Government of India appears correct.

Sd.

O.C.

Remembrancer of Legal Affairs.

VGP. 14-6-56.

It appears that some Muslims allege that the Lal Baugh Estate at Parel, a wakf property, was unauthorisedly and without the approval of the Muslim Community sold forty years ago by a former "Mujawar" to the Trustees of the J.N. Petit Orphanage and desire Government to ~~interview~~ intervene on behalf of the Muslim Community to restore the property to the Community, as it contains Durgas a grave yard, failing which the breach of peace is threatened. The question for consideration of the R.L.A. is whether Government can intervene in the matter.

2. It is true that wakf property cannot be alienated except in certain cases (see Mulla's Mohomedan Law page 160) but it is undisputed that the alienation of the property took place about 40 years ago and consequently it cannot now be challenged (see Article 134-B of the Limitation Act which prescribed twelve years for claiming possession of Mahammadan endowment property transferred by a previous manager; and the limitation runs from the death of the transferor). Furthermore, it is the duty of the Civil Court to give possession on the ground of right, and it is the Magistrate's duty under section 145 of the Criminal Procedure Code to maintain possession against force or show of force and not to give a form of execution that the Civil Courts cannot give (Cal 290). Consequently Government cannot intervene in the matter which can now only be settled by due process of law.

Sd.

o.c.

Remembrancer of Legal Affairs.

U.R. to R.D. No. 6623, dated the 28th Sept. 1946.

VGP. 14-6-56.

The question referred to the R.L.A. for consideration is whether the appeal pending with the District and Sessions Court, Allahabad can be transferred to any District Sessions Court subordinate to the Bombay High Court under section 527 of the Criminal Procedure Code.

Sub-section (1) of section 527 of the Criminal Procedure Code provides :-

"The Provincial Government may by notification in the Official Gazette direct the transfer of any particular case or appeal from one High Court to another High Court or from any Criminal Court subordinate to one High Court to another Criminal Court of equal or superior jurisdiction subordinate to another High Court, whenever it appears to it that such transfer will promote the ends of justice or tend to the general convenience of parties or witnesses :-

Provided that no case or appeal shall be transferred to a High Court or other Court in another Province without the consent of the Provincial Government of that Province."

It appears clear from these provisions that it would open to the U.P. Provincial Government alone to transfer the appeal pending with the District and Sessions Court, Allahbad to any Criminal Court of equal or superior jurisdiction subordinate to the High Court in another Province with the consent of the Provincial Government of that Province. Should this Government find that the petitioner is not likely to get justice in the District and Sessions Court, Allahabad it appears that there are hardly any grounds ti justify it all that Government can do is to request the U.P. Government to transfer the appeal to any Criminal Court of equal or superior jurisdiction to the High Court in another Province.

Sd. P.M.Lad

O.C.

for Remembrancer of Legal Affairs.

U.O.R. to H.D. No. 6934 dated the 14th October 1946.

VGP, 14-6-56.

It appears that on a complaint of cheating by making a false documents the Sub-Inspector Gore proceeded with the investigation and arrested the accused for the offence under section 420 Indian Penal Code, but refused bail on the ground that the accused were also charged with the non-bailable offence under section 468, Indian Penal Code. The question raised for the consideration of the R.L.A. is whether the action of the Sub-Inspector in refusing bail in the circumstances was illegal in view of the fact that the arrest was under section 420 which is a bailable offence while section 468 which also applied to the case is a non-bailable and non-cognizable offence.

Section 496, Criminal Procedure Code, inter alia provides that when any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station and is prepared at any time while in the custody of such officer to give bail ~~any~~ such person shall be released on bail. Section 497(1) inter alia enacts that when any person accused of a non-bailable offence is arrested or detaind without warrant by an officer in charge of a police station he may be released on bail but he shall not be so released if there appear reasonable grounds for beleiving that he has been guilty of an offence punishable with death or transportation for life. These provisions have to be read together Section 496 deals with the bail of persons arrested or detained for a bailable offence as defined in clause(b) of section 4(1) while section 497(1) deals with that of persons arrested or detained for a non-bailable offence as defined in the same clause. Consequently the words "other than a person accused of a non-bailable offence" in section 496 appear to mean other than a person arrested or detained being accused of a non-bailable offence. In the present case the accused were arrested or detained for a bailable offence under section 420. Consequently

the Sub-Inspector was bound to release the accused on bail under section 496. It is true that there were certain allegation against the accused of the offence under 468 Indian Penal Code But that is a non-cognizable though non-bailable offence and the Sub-Inspector could not investigate it without the order of the Magistrate nor could be arrest or detain the accused without a warrant from the Magistrate(see section 155(2) and (3) Criminal Prosdure Code). In fact, the Sub-Inspector did not arrest or detain the accused for the offence under section 468 Indian Penal Code. The accused were not therefore persons accused of a non-bailable offence within the meaning of section 496 and consequently the action of the Sub-Inspector in refusing bail to the accused xxx was unwarranted and hardly justifiable.

Sd.

O.C.

Remembrancer of Legal Affairs.

U.R. to H.D. No. 243-Confl. dated the 25th July 1946.

VGP. 14.6.56.

Office of the P.L.A.

By H.D. (poll) No. S.D. 633/18280(A) and (B) dated the 29th Oct. 1946 issued under sub-section (6) of section 144 of the Criminal Procedure Code. 1898 Government continued the curfew order and the order prohibiting assembly of more than five persons for a period of seven days and one month respectively from 30th Oct. 1946. H.D. states that all that Government has to do is to notify in the Gazette that the order issued by a local officer shall remain in force beyond two months or until further orders and the local officer concerned can then make modifications in his original order according as circumstances require e.g. change of curfew hours and areas. The H.L.A. is requested to advise whether this view is correct and if not to advise how the further modification in the curfew order which the Commissioner of Police may desire to make should be notified.

2. Sub-section (6) of section 144 of the Code of Criminal Procedure 1897. provides that no order under the section shall remain in force for more than two months from the making thereof, unless in cases of danger to human life, health or safety or likelihood of a riot or any affray, the Provincial Government by notification in the Official Gazette otherwise directs. Under this sub-section the Provincial Government can only extend the period (beyond twon months) during which an existing order passed under this section (s.144 sub-section (1) Cr. P.C.) shall remain in force and has no power to pass any other order. Under sub-section (4) any Magistrate may, either in his own motion or on the application of any person aggrieved rescind or alter any order made under this section by himself or any Magistrate subordinate to him, or by his predecessor in office. It would therefore be open to the Commissioner of

Police as a Presidency Magistrate to modify under sub-section (4) an order passed by him under sub-section (1) in respect of which a notification extending the time has been made by the Government under sub-section(6).

Sd.:

C.C.

Remembrancer of Legal Affairs.

U.R. to H.D. SPL. No. 7707 Special dated the 4th November 1946.

VGP. 14-3-56.

It is desired by H.E. that the Circular at page 39 ante should be so worded as to exclude from its purview individual criminal complaints. I suggest that the Circular may be redrafted as follows:-

It has been brought to the notice of Government that the procedure followed by the Magistrates and the Police with respect to the inquiry into or investigation of complaints made by the public relating to serious offences has been discouraging. Government desires that in order to create a sense of confidence in the public and to get from the public full co-operation in the matter of inquiry into and redress of public grievances District Magistrates and Superintendents of Police should order that as far as possible the inquiries into or investigation of complaints made by members of the public should be conducted in the presence of the complainants or responsible public workers who bring the complaints to the notice of officers.

Sd.

C.C.

Remembrancer of Legal Affairs.

U.R. to H.D. No. 6940, dated the 14th October 1946.

VGP. 14-6-56.

The circular clearly should not cover complaints lodged or taken cognizance of under the Criminal Procedure Code, 1898. I append a revised draft circular which I think will serve Secretary H.D.'s purpose.

Sd.

cc.

Remembrancer of Legal Affairs.

U.R. to H?D. No. 8263, dated the 21st November 1946.

VGP. 14-6-56.

The question for R.L.A.'s consideration is whether it would not be legal to effect a general round up under section 54 of the Code of Criminal Procedure, 1898.

Section 54 does not give an unqualified power in all cases to any police officer to arrest without an authorisation in writing, a person concerned in a cognizable offence. (p. 114 of Mitra's Criminal Procedure Code). The words "may arrest" show that the power of arrest is discretionary. A police officer is not always bound to arrest for cognizable offences. If an information of such an offence is brought to him he ought, if the there be circumstances in the case which lead him to suspect the information, to refrain from arresting persons of respectable position and to leave the complainant to go to a Magistrate and convince him that the information justifies the serious step of issue of a warrant of arrest. Underthe first clause, what is reasonable complaint or suspicion must depend on the circumstances of each particular case, but it must at least be found on some definite fact tending to throw suspicion on the person arrested and not a mere vague surmise on information. Still less have the police any power to arrest person, as they sometimes appear to do, merely on the chance something being thereafter proved against them. Section 54 no doubt gives wide powers to a police officer to make arrests without an order from the Magistrate and without warrant only in certain circumstances limited by the provisions contained in the section, and it is necessary in exercising such large powers to be cautious and circumspect (see 44 Cal 76). Consequently, it is not legally permissible to effect a general round up under section 54, Criminal Procedure Code.

Sd.

O.C.

Remembrancer of Legal Affairs.

U.R. to H.D. (SPL).No. 824-Confl. dated the 26th November 1946.

VGP. 14-6-56.

There appears to be no statutory provision empowering Government to impose a general ban on the entry of "Dawn" into this Province. Section 26(1) of the Indian Post Office Act, 1898 and section 22 of the Indian Press (Emergency Powers) Act, 1931, are the only provisions which can be resorted to to prevent transmission thereof by post. Section 144, Criminal Procedure Code, will have no application for the purpose.

Sd.

O.C.

Remembrancer of Legal Affairs.

U.R. to H.D. No. 8858 dated the 9th December 1946.

VGP. 14-6-86.